PETITION NOT PRINTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 436, Misc.

HENRY A. CULVER AND THOMAS GOBEL CULVER; LUCILE CULVER BONN AND MABEL CULVER WATSON, INDIVIDUALLY AND AS EXECUTRICES UNDER THE WILL OF FANNIE CULVER IVERSON,

Petitioners,

vs.

THE CARTER OIL COMPANY, T. E. CULVER, CORDIE CULVER MARKHAM, EDGAR T. CULVER, L. G. ROGERS, W. O. ALLEN, W. F. SCHUERMEYER, C. R. BENNETT, A. GORDON MASON, T. CONWAY McMURRAY, A. P. HEINZE, J. F. HARMAN, JR., AND JOHN C. ROGERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

CASES CITED.

TEXT BOOKS CITED.

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I.

STATEMENT OF THE CASE.

The petitioners filed their complaint in equity on January 22, 1946, in the District Court of the United States for the Western District of Kentucky to recover an undi-

vided 218/842 of the oil and gas rights and other minerals under 1503 acres of land in Union County, Kentucky, that had been owned by their father, H. C. Culver, in his lifetime.

In the father's lifetime a corporation had been formed which owned the mineral interests, and the father owned 218 shares, his two brothers, T. E. and R. N. Culver, each owned 208 shares, and a sister, Mrs. Markley, and her husband also owned 208 shares. The father's interest was sold by order of the State Court of Kentucky in the administration of his estate on December 16, 1937, and a conveyance of that interest made to the defendant T. Conway McMurray, and said sale duly confirmed by the State Court. About the same time the brother, R. N. Culver, made a voluntary sale and conveyance of his interest to the defendant, A. Gordon Mason, for substantially the same consideration for which the interest of the deceased father was sold in the administration of his estate.

The complaint charged that the sale of the father's interest in the State Court was procured by the fraud of the defendants McMurray, Mason, T. E. Culver, Mrs. Markley, Bagbey, the administrator of the estate, and others, and that The Carter Oil Company took its lease with notice.

At the trial it was stipulated and agreed that (subject to correction if the record facts appear otherwise) the defendant, The Carter Oil Company, in its Tenth Defense, had set forth correctly the mesne conveyances from McMurray and Mason of the interests in the oil and gas under the land involved, and that the present owners of the interests in said oil and gas received by said McMurray and Mason are the persons holding under the deeds as set forth in said Tenth Defense, and that said chain of title was correctly set forth in said Tenth Defense of

The Carter Oil Company, and that said purchasers of said interests from the said McMurray and Mason, from time to time as they became the owners of said interests under their respective deeds, had ratified and confirmed the lease of The Carter Oil Company. No record facts were introduced by petitioners to show any error in said stipulation as to title.

At the time of the purchase of the interest of the petitioners' father in said minerals under the land there had been no oil development in that community, but some time later oil was discovered and wells were brought into successful production. Petitioners knew of the sale of their father's interest in the State Court and of the amount for which it sold, and two of the petitioners lived within a few miles of the lands involved and knew of the subsequent development thereof for oil production and did nothing for over eight years, when this suit was filed. The Carter Oil Company took its lease in reliance upon the record title that was examined and approved by competent attorneys and made the development in reliance upon the record title.

There was not a scintilla of evidence, direct or circumstantial, to prove the fraud charged, and at the conclusion of the plaintiffs' evidence the District Court sustained a motion of the defendants that the suit be dismissed for want of equity, and in an oral opinion reviewed the evidence and found that there was not a scintilla of evidence to prove fraud and, also, that the cause of action was barred by the statute of limitations of the State of Kentucky, and also by laches.

II.

ARGUMENT.

Summary of the Argument.

Point A. The motion for leave to proceed in *forma pauperis* should be denied because:

(1) The order complained of, denying motion to excuse printing record, was entered on June 4, 1948, and no petition for certiorari filed within three months;

(2) Petitioners abandoned claim to proceed in *forma pauperis* in answer filed to motion of appellees to dismiss;

(3) The alleged cause of action is frivolous and without any merit whatsoever; and

(4) The printed record shows no Federal question or other grounds upon which certiorari can be issued.

Point B. Certiorari should be denied in this case because:

(1) The alleged cause of action is entirely frivolous and totally without merit;

(2) The record contains no evidence, direct or circumstantial, showing any fraud of the defendants as alleged in the complaint;

(3) The District Judge was not biased or prejudiced but, on the contrary, was extremely patient during a trial that extended from Tuesday, September 16, to Thursday of the following week, September 25, and under the law, and by reason of an entire absence of evidence, was compelled to make an adverse finding and dismiss the complaint for want of equity; and

(4) The questions raised by petitioners are solely fac-

tual and the petition for certiorari presents no Federal or other question upon which jurisdiction for certiorari could be based.

POINT A.

1. The Petition for Certiorari in This Case Has Not Been Presented in Time.

Petitioners say that the questions presented are:

(1) Were petitioners entitled to a hearing on their appeal in *forma pauperis,* without printing the record?

(2) Was the denial by the Court of Appeals of petitioners' motion for a rule on respondents to show cause why the judgment of the District Court should not be reversed for bias and prejudice of the trial judge correct?

The petition shows that on April 20, 1948, petitioners moved for an order to show cause why the judgment should not be reversed for the prejudice of the trial judge and that the printing of the record be waived. The petition admits that in that motion they did not plead the pauper statute. This motion was overruled on April 23, 1948. The petition then shows that on May 27, 1948, petitioners for the first time moved that the Court of Appeals waive the printing of the record on appeal, supported by affidavits under the pauper statute, and this motion was denied on June 4, 1948, on the ground that it "presents in our judgment *no merit* and is, accordingly, denied."

One of the objections filed to this motion to waive the printing of the record was that there was no right to proceed as a pauper because the claim was frivolous and without merit. There is nothing in the record or in the petition to show that the Court of Appeals denied the motion to waive the printing of the record in that court because of any defect in the affidavit as to the poverty of

the appellants. In fact the order entered showed that the motion was denied *on the merits*.

The petition further shows that after the decision of this Court in *Adkins* v. *DuPont* that the petitioners on January 7, 1949, filed their motion in the Court of Appeals to vacate the order dismissing the appeal, entered on October 19, 1948 and to grant the motion to waive printing the record, and called the attention of the Court of Appeals to the decision in the *Adkins* case, which held that it was sufficient to comply with the pauper statute to show the poverty of the clients and it was not necessary that there be poverty of the attorney retained on a contingent basis. Objection to that motion for a rehearing was made by appellees, that poverty of the clients alone was not sufficient to justify waiving the printing of the record but it must further appear that the claim was meritorious, and that in this case the claim of the petitioners was frivolous and entirely without merit. The Court of Appeals denied that motion on February 7, 1949, after the decision in the *Adkins* case had been called to their attention and the full holding of which was conceded by appellees, and it is obvious that the Court of Appeals denied that motion because the claim of petitioners was frivolous and without merit.

As above noted, the only question presented by the petitioners is whether there was error of the Court of Appeals in denying the motion of petitioners to reverse the judgment because of bias of the trial judge and without printing the record, which order was entered on April 23, 1948, or the subsequent order entered by that court on June 4, 1948, denying a motion to waive printing of the record under the pauper statute.

Each of those orders was a final order and finally disposed of the subject matter of said motions. If petitioners

sought a review by certiorari they were required to file their petition for certiorari within three months under the law then in force. This they failed to do. Neither did they file any petition for a rehearing of either of said motions or do anything else within three months but finally, after appellees had moved to dismiss the appeal for failure to print the record, petitioners on October 2, 1948, and without leave of the court, filed a petition for rehearing. This petition for rehearing was never acted on by the court but on October 19, 1948, the appeal was dismissed for failure to print the record.

There is no right to file this petition for certiorari in *forma pauperis* where the time has gone by within which certiorari may be applied for under the law. This rule is mandatory and completely forecloses any right of the petitioners to have certiorari granted on the two questions set forth in the petition. If they had filed their motion for a rehearing within the three months' period, that would have extended the time, but the failure to do so and the filing of a petition for a rehearing later without leave of the court, and on which the court has never acted, gives no jurisdiction in this Court to grant the writ of certiorari. *DeJordan* v. *Hudspeth*, 137 F. (2d) 943 (Certiorari denied 320 U. S. 779, 88 L. Ed. 468, 64 Sup. Ct. 87). Rule stated supported by numerous decisions in Vol. 10 Cyc. of Fed. Proc. (2d ed.) Sec. 5116.

It is obvious that the motion of petitioners to reverse the judgment for bias of the trial judge, without printing the record and without any claim of the inability of petitioners to print the record, was so frivolous and without merit that it characterizes all of the actions of petitioners' counsel in this case. It is elementary that a judgment could not be reversed for bias of a trial judge without a full consideration of the record, and the fact that counsel for petitioners made and insisted upon such motion (ap-

parently in good faith) prevents any weight or credence being given to his belief as to the merits of this controversy or as to his asserted complaint against the trial judge.

That both of the orders of the Court of Appeals complained of, and which are the basis of this petition for a writ of certiorari, are final orders regarding the subject matter of said motions and from which a petition for certiorari could have been prosecuted within three months under the law as it then stood, is not debatable. In other words there was no necessity to wait until the appeal was dismissed for failure to print the record in order to apply for certiorari. In *Adkins* v. *DuPont*, mentioned in the petition, there was no final judgment dismissing an appeal but the appeal was taken solely from an order of the Court of Appeals denying the motion of the petitioner to accept its appeal in *forma pauperis*.

2. Petitioners Abandoned and Never Re-asserted Their Claim Under the Pauper Statute Within the Statutory Limitation of Time.

Appellees gave notice to counsel for petitioners on July 24, 1948, that they would present on August 2, 1948, their motion to dismiss the appeal for failure to print the record. Counsel for petitioners on July 29, 1948, filed an answer to that motion, objecting to the dismissal and attempting to excuse their delay in filing the printed record. This answer made no mention of the former rulings of the court and raised no objection at all to the court's ruling denying them the right to proceed in *forma pauperis*, nor to the ruling on their motion to remand on account of the bias of the trial judge. They completely abandoned their claim of error in these respects until after the time for certiorari had expired and it was too late to re-assert them.

Finally, on October 2, 1948, and after more than three months had expired from the time of the orders now complained of, petitioners filed a petition for a rehearing of the orders complained of, refusing to remand the case for prejudice of the trial judge and for refusal of petitioners' motion to proceed in *forma pauperis*. No leave was obtained from the court to file this petition for a rehearing, and neither was said petition for rehearing acted upon by the court, but on October 19, 1948, the motion of appellees to dismiss the appeal for failure to print the record was sustained and the appeal was dismissed.

The record in this case also shows by the testimony of Mabel Culver Watson, one of the petitioners (Tr. 124), that her husband is a financial analyst with the Standard and Poer Publishing Company of New York, and that the husband of the other petitioner, Lucile Culver Bonn, is and has been engaged in the printing business in the City of New York all his life (Tr. 44).

It is submitted that judicial discretion requires that this petition to proceed in *forma pauperis* be denied, for there certainly is no valid reason why the record should be printed at public expense in a case where the husband of one of the petitioners is in the printing business and the other is a business man, and well able to print the record if they had confidence in their case.

The public should not pay the expense of litigants who want to gamble on a possible reversal of a judgment in a case that is frivolous and without merit, and are unwilling to stake their own money.

3. The Alleged Cause of Action Is Frivolous and Without Any Merit Whatever.

The District Judge, in a memorandum filed on February 11, 1948, upon plaintiffs' motion for an order settling and approving unreported proceedings, said:

> "The trouble with the plaintiffs' case is, that considering everything they offered, including dozens of exhibits and hundreds of pages of testimony offered by numbers of witnesses, and accepting all of it as competent, they just didn't have any case. Their contention was one wholly lacking in merit."

Further discussion of this point is found in the argument on Point B.

4. The Printed Record Shows No Federal Question or Other Grounds Upon Which Certiorari Can Be Issued.

The only issue in this case is that counsel for petitioners claim they have a cause of action. The District Judge correctly held that there was not a scintilla of evidence to prove the fraud alleged. There is nothing in the record to show that the Circuit Court of Appeals for the Sixth Circuit refused to follow the decision of this Court in *Adkins* v. *DuPont* in relation to the right to proceed in *forma pauperis,* but, on the contrary, it is obvious that that court denied the motion to waive printing of the record and to proceed in *forma pauperis* solely on the ground that the appeal was frivolous and devoid of any merit whatever.

Point B.

We understand that under the rules of this Court the petition for certiorari will not be acted upon until the record of the court below is filed in this Court. In discussing this point our references are to the page of the typewritten record as written up by the court reporter and filed in the Court of Appeals.

1. The Alleged Cause of Action Is Entirely Frivolous and Totally Without Merit.

Counsel for petitioners, at the top of page 5 of the written petition for certiorari, say that in the Court of Appeals one of our objections to their motion to waive printing of the record was that petitioners' claim is without merit and frivolous. In response to that they state that this objection is wholly immaterial as a matter of law.

Such position of the petitioners is unsound, and in the reply of petitioners dated October 13, 1948, to appellees' objections to petitioners' motion for a rehearing, counsel for petitioners, in the very first paragraph of said reply, state:

> "Appellants freely concede that the right given appellants by the statute may be denied them if the court should find that the cause of action or appeal is frivolous."

The statute (Title 28, Section 1915, U. S. C.) clearly shows that a discretionary power is given to the court to authorize proceedings in *forma pauperis* because in paragraph (a) it says that any court of the United States *may* authorize such proceedings. Then in paragraph (d) it says that the court may dismiss the case if satisfied that the action is frivolous.

The necessity that the cause of action be meritorious and not frivolous is sustained by all the decisions (*Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 59 L. Ed. 457; *Demaurez* v. *Squier*, 121 F. 2d 960 (9 C. C. A.), Certiorari denied 314 U. S. 661, 86 L. Ed. 530).

Paragraph (a) above provides "an appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith".

The effect of this statute is not to give a right to proceed in *forma pauperis* in the absence of a certificate of the trial judge, since if no application is made to the trial judge, as in this case, there is no occasion for it to issue a formal certificate that the appeal is frivolous. The only effect of that statute is that if the trial judge is requested to give a certificate to prosecute in *forma pauperis* and certifies that the appeal is not taken in good faith, then there is no power in the Court of Appeals or this Court to grant such leave (*In re Snow*, 147 F. (2d) 1006, (9 C. C. A.), Certiorari denied 325 U. S. 836, 89 L. Ed. 1893).

We think that the record made by the District Judge in disposing of this case, to which reference is hereafter made, does have the effect of a certificate of the District Judge that this appeal is without merit and frivolous.

2. The Record Contains No Evidence, Direct or Circumstantial, Showing Any Fraud.

The petitioners undertook to prove that their interest in certain minerals that they inherited from their father was taken away from them by fraud of certain persons named when that interest was sold in the administration of the father's estate in the State Court in Union County, Kentucky.

The petitioners themselves affirmatively proved that there was no fraud and that any alleged claim was barred by the statute of limitations, and by laches.

The record shows as follows:

(1) Attached to the complaint was an oil and gas lease from the Culver Oil and Mineral Company to S. W. Thompson for the land in question, and plaintiffs offered in evidence Plaintiffs' Exhibit No. 34, dated July 7, 1938, assigning that lease to The Carter Oil Company.

(2) Plaintiffs' Exhibit No. 23, being copy of order of the Union Circuit Court, dated December 16, 1937, for the sale of the mineral interest belonging to the estate of petitioners' father and which is the subject of this litigation.

(3) Plaintiffs' Exhibit No. 36, being assignment of oil and mineral stock of the H. C. Culver estate by Otho Bagbey, administrator, to T. C. McMurray.

(4) Deposition of Judge M. L. Blackwell, who entered the order for the sale of the stock in the Union County Circuit Court, read in evidence, which conclusively showed that the petition, order and sale was entirely regular and without fraud (R. 135).

(5) W. H. Lindo, Clerk of the Union Circuit Court, was called as a witness for plaintiffs, and identified all the records and from his testimony the proceeding was regular (R. 1).

(6) Otho Bagbey was called as a witness for the plaintiffs and testified (R. 338) that he was the administrator in the administration of the estate and that the shares of stock of H. C. Culver, deceased, in the Culver Oil and Mineral Company was a part of the assets of the estate; that there was no interest in oil development in the community and no market, and that his attorney, Mr. Jones,

tried for several months to find someone to buy this interest in the corporation and finally found T. C. McMurray as a purchaser, and that his attorney prepared the papers and procured the court order for the sale of the stock, and he sold the stock to McMurray and accounted for the proceeds as administrator of the estate. His testimony showed no fraud whatever, and that he filed his final account, and it was approved and he was discharged.

(7) Defendant Thomas C. McMurray was called as a witness for the plaintiffs (R. 378) and from his testimony it appeared that he had formerly been sheriff of the county, and that he bought this stock at the administrator's sale purely as a speculation. There was absolutely nothing to show any fraud of any kind.

(8) Defendant A. Gordon Mason was called as a witness for the plaintiffs (R. 430) and from his testimony it appeared that he was a banker in that county and that he purchased, at a voluntary sale, from Ran Culver, a brother of petitioners' father, the interest of this brother in the stock of the Culver Oil and Mineral Company which consisted of 208 shares, and it was purchased about the same time as the date of the administrator's sale, and that the amount he paid was substantially the same as the amount that the administrator had received.

(9) Defendant T. E. Culver was called as a witness for the plaintiffs (R. 531) and also his pre-trial deposition, together with the pre-trial depositions of McMurray and Mason, was offered in evidence. From these depositions it appears that after Mason bought his interest from Ran Culver, and McMurray bought H. C. Culver's interest at the administrator's sale, then they, together with the owners of the remainder of the stock of the Culver Oil and Mineral Company, ratified the original lease that had been executed by that corporation to S. W. Thompson,

above mentioned, and the plaintiffs offered in evidence the record of the stockholders' meeting, where all stockholders were present, authorizing the ratification, and also introduced the ratification itself.

(10) All of the petitioners testified but there was nothing in the testimony of any of them that touched the merits of the controversy or that showed any fraud upon the part of anyone, but from their testimony it appeared that two of them lived only a few miles away from the land, and that Mrs. Henry A. Culver and her husband (R. 671), a few days after the sale by the administrator, learned of that sale and called upon an attorney to discuss the sale, and that at the time they knew what the shares of stock had been sold for to the defendant McMurray, and they were advised by the attorney that he thought the stock had brought all it was worth and that the sale was valid, and then she and her husband discussed the matter with other attorneys and waited over eight years before filing this suit.

(11) The plaintiffs called Joseph A. Gill, Jr., an attorney for The Carter Oil Company (R. 555), and his testimony showed that The Carter Oil Company bought this lease for a valuable consideration and in reliance upon the record title.

(12) The plaintiffs showed that the Culver Oil and Mineral Company, after ratifying the lease to The Carter Oil Company, conveyed by deed the mineral interests to the several stockholders in accordance with the proportion of the stock held by them respectively, and that such mineral interest was conveyed to defendant Gordon and defendant McMurray. By stipulation (R. 35-A) it was stipulated and agreed that The Carter Oil Company, in its Tenth Defense of bona fide purchaser for value, had correctly set forth the chain of title, showing conveyances

from defendants McMurray and Mason of the interest that they had received in the minerals under this land and the present owners of those interests, and it was further stipulated and agreed that said purchasers of said interests from the said McMurray and Mason, from time to time as they had become the owners of said interests under their respective deeds, ratified and confirmed the lease of The Carter Oil Company mentioned in the complaint.

In all, plaintiffs called twenty-two witnesses and, in addition, introduced the depositions of several witnesses and, all together, more than one hundred and twenty exhibits, and there is not a scintilla of evidence in the testimony of any of said witnesses from which, by the widest stretch of the imagination, it could be inferred that there was any fraud upon the part of anyone.

That there is not a scintilla of evidence proving the fraud alleged in the complaint appears from the considered judgment of the District Court in its opinion rendered at the close of all the evidence, when the court said (R. 702):

> "The case is now before the Court on the defendant's motion and each of the defendant's motion to dismiss under rule 41B. That motion is that the sufficiency and competency, rather the competency of all the evidence and the sufficiency of all competent evidence does not make out a case. In other words, it is sort of in the nature of a demurrer to the evidence, admitting all the facts purported to be proved as competent evidence, the plaintiff has failed to sustain the allegations of the pleadings on which he relies for a recovery. There is no trouble about this case, gentlemen. The Court has been very lenient toward the plaintiff in permitting the admission of evidence, of testimony. I realize that a case of this character, under the allegations, the nature of the case, the fact that most of the facts on which the plaintiffs must rely for recovery, are necessarily in possession of their

adversary, and consequently, with that fact in mind, the Court has throughout these past several days been more than indulgent in the admission of evidence. In fact I think after concluding the evidence for the plaintiff about seventy five percent is wholly incompetent and irrelevant. The plaintiff has just failed to make out a case."

3. The District Judge Was Not Biased or Prejudiced.

The record in this case shows that the District Judge was unusually patient and very lenient to counsel for petitioners in the trial of the case.

Present counsel for petitioners had associated with him three experienced and competent local attorneys residing at Owensboro, Kentucky. There is no assertion of any fact of any personal feeling of the trial judge against any counsel for petitioners and, in fact, there could have been none for it is apparent that present counsel for petitioners was a stranger to the trial judge.

The claim of bias or prejudice of the trial judge is sought to be inferred solely because of the adverse ruling of the trial judge against petitioners' contention.

In *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 57 L. Ed. 1379, it is held that the basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case, and that it is not sufficient to show adverse rulings already made, which may be right or wrong, but facts and reasons which show personal bias or prejudice, and that it was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise.

The same rule is announced in *Berger* v. *U. S.*, 255 U. S. 22, 65 L. Ed. 481, relied upon by petitioners, and the later

case of *Price* v. *Johnston*, 125 F. (2d) 806, certiorari denied 316 U. S. 677, 86 L. Ed. 1750.

Mere impatience on the part of a trial judge is no evidence of bias or prejudice. In *Buckley* v. *Altheimer*, 152 F. (2d) 502, the court said (511):

> "Plaintiff insists that the trial judge showed hostility and prejudice, pre-judged the issues, was impatient, and compelled plaintiff to try the case under pressure and under constant threats that he would send her counsel to jail, would fine him, and would punish him for contempt of court, although his conduct at no time justified any of the threats. We have examined the record, especially that part containing the passages of which plaintiff complains. There is no evidence that the court was prejudiced against plaintiff or that he had pre-judged the case. True, on several occasions during the trial, the court did suggest that counsel had wasted time, and told him to get some facts into the evidence, that he would have to hurry and get through with the case, and on May 16, the thirteenth day of the trial, the court said '* * * patience ceases to be a virtue. If you do not proceed differently from the way you have been doing, you are going to spend some few days in jail * * *. Now you proceed.' While at times the judge might have indicated impatience, nevertheless we would not be warranted in holding that this constituted bias or prejudice calling for a reversal."

It was held in *Scott* v. *Beams*, 122 F. (2d) 777, 789, certiorari denied 315 U. S. 809, 86 L. Ed. 1208, that notwithstanding the court was not approving all of the statements, comments and criticisms coming from the court, yet there was no showing whatever that the complaining parties failed to introduce all the evidence which was available to them; that the cause would not be reversed since it was obvious that the court had reached the right conclusion in the end.

The complaint is made of a statement of the court, found on page 6 of the petition, which counsel says is an unwarranted personal attack upon him, as follows:

> "I might say to you frankly and for the benefit of your clients, that so far you haven't introduced anything even approaching evidence in this case; and you have exhausted the patience of this court, the cost of conducting this court, and the money of your clients, by a lot of innuendos and inferences, BUT YOU HAVEN'T INTRODUCED ANYTHING THAT ANY RESPECTABLE LAWYER IN THIS COURTROOM WOULD CALL EVEN APPROACHING EVIDENCE." (R. 311-12.)

It is obvious and apparent that the word "respectable" was used by inadvertence and that the court meant "competent".

This statement was made at the close of almost three days of taking of testimony. A number of depositions had been read, a large number of exhibits introduced, and several witnesses had testified. Not a scintilla of evidence had been introduced from which any inference of fraud whatsoever could be made.

On the day previous to the incident complained of, and after more than a day and a half of the time of the court had been consumed, counsel for petitioners conceded that he had offered no competent evidence, which appears in the record (58):

> "Mr. Benton: Much of the evidence you have heard today definitely is not pertinent and competent."

Then the next day, notwithstanding no competent evidence had been offered, the incident occurred when plaintiffs' counsel was examining Nelson Y. Ruth, an employee of The Carter Oil Company, who had taken part in the procurement of the lease on the property in question (R. 276). This witness had testified fully and frankly to all of his

connection in procuring the lease in question and had produced all the letters and documents of The Carter Oil Company in connection with that lease, but in the course of his examination it appeared that there was at the Tulsa office of the company documents and letters concerning other leases in what was known as the Hitesville Block. This so-called file had nothing to do with the particular lease in question, but The Carter Oil Company, at the request of Mr. Benton, had brought into court every letter or written document of any kind that it had in relation to procuring the particular lease in question.

Mr. Benton stated to the court that he called for The Carter Oil Company to produce that entire file, and in response to that request the court said (R. 311):

> "I am not going to require this company to produce its whole Oklahoma file in this case; they have apparently, to me been most cooperative in giving you everything that you would have liked to have. I think you are very obviously launching yourself upon an expedition and using this Court as a Court of inquiry. Now, personally, I am just about exhausted with permitting you to introduce what you offer here to be evidence which is not even related to the issue. The issue of this case is 1937—whether or not this contract of sale of stock of the Culver Mineral Company was a fraud. We have gone into the whole field of Union County oil transactions, and I might say to you frankly and for the benefit of your clients, that so far you haven't introduced anything even approaching evidence in this case; and you have exhausted the patience of this Court, the cost of conducting this Court, and the money of your clients, by a lot of innuendos and inferences, but you haven't introduced anything that any respectable lawyer in this courtroom would call even approaching evidence."

The record shows a number of pre-trial depositions taken of employees of The Carter Oil Company and other persons in an attempt to discover some evidence of fraud, and we confidently assert that the District Judge was correct in his appraisal, that nothing was introduced by the plaintiffs that furnished even a scintilla of evidence to show the fraud alleged, and for the District Judge to have entered any order except one dismissing the complaint for want of equity would have been a reflection upon either the integrity or the intelligence of the court.

4. The Questions Raised by Petitioners Are Solely Factual and Furnish No Basis for Certiorari.

The writ of certiorari is not a matter of right and petitioners have failed to set forth anything in the record of this case that justifies a writ of certiorari. The petition for certiorari in this case is not based upon any conflict with the decision of another Circuit Court of Appeals on the same matter, and neither does the case involve a Federal question in a way probably in conflict with applicable decisions of this Court.

There is no question in this case as to the proper construction of Title 28, Section 1915, of the Judicial Code, in reference to proceeding in *forma pauperis*, for that question does not arise in any case where the claim is frivolous and devoid of merit, as appears in this case.

Under the decisions of this Court (*Murphy* v. *Bird*, 275 U. S. 487, 72 L. Ed. 387; *Barnett* v. *Connor, et al.*, 315 U. S. 809, 86 L. Ed. 1208) a motion to proceed in *forma pauperis* is denied where the court upon an examination of the papers submitted finds no ground upon which a writ of certiorari should be issued.

In this case the judgment complained of was entered because of a total failure of the plaintiffs to prove the

fraud that was alleged as the basis of their action, and the rights of the parties depended upon the local law of the State of Kentucky, and therefore there is no right to the writ of certiorari to review such judgment.

Respectfully submitted,

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